



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: GVC Companies--Entitlement to Costs

File: B-254670.4

Date: May 3, 1994

Robert J. Sherry, Esq., McKenna & Cuneo, for the protester.
John J. McGovern, Jr., Esq., Wunder, Diefenderfer, Cannon &
Thelen, for Mirabella, S.p.A., an interested party.
Garrett L. Rensing, Esq., Department of the Navy, for the
agency.
Paul E. Jordan, Esq., and John Van Schaik, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Where agency did not unduly delay taking corrective action
in response to a clearly meritorious protest, protester is
not entitled to the costs of filing and pursuing its
protest.

DECISION

GVC Companies requests that our Office declare the firm
entitled to recover the reasonable costs of filing and
pursuing its protests concerning request for proposals (RFP)
No. N62470-91-RP-00195, issued by the Department of the
Navy. GVC filed three protests challenging the award to
Mirabella, S.p.A. on the basis of Mirabella's failure to
meet various RFP requirements.

We find that the protester is not entitled to recover its
costs of filing and pursuing its protests.

The RFP sought proposals for the first phase of a lease-
construction procurement of a self-contained support complex
for the U.S. Navy in Naples, Italy. This first phase
consisted of the complex site, a minimum of 500 family
housing units, dependents school, recreational facilities,
and related site improvements. The RFP contemplated a
contract covering a base year with 9 option years. Among
other matters, the RFP required offerors to submit
satisfactory evidence of either site ownership (e.g.,
registered deed), access to ownership (e.g., purchase
option), or other sufficient control to carry out all the

terms and conditions of the leases to be awarded. On August 17, 1993, the Navy advised Mirabella that it had been awarded the contract, contingent upon the satisfaction of certain preconditions and approvals by the United States and Italian governments.

On August 27, GVC filed its initial protest alleging primarily that Mirabella's proposal did not meet the RFP requirements for evidence of site ownership and control. On September 10, the Navy requested summary dismissal of the protest arguing that GVC was not an interested party to protest. 4 C.F.R. § 21.0(a) (1993). According to the Navy, GVC's price proposal was unacceptable because it included rents which exceeded the \$20,000 cap on rental of family housing in foreign countries as specified in 10 U.S.C. § 2828 (Supp. V 1993).¹ On September 24, GVC amended its protest to challenge the agency's determination that GVC's proposal was unacceptable, without first considering whether to seek a waiver of the statutory cap on rents.

On October 4, the Navy filed its report with our Office responding in detail to the issues raised in both GVC's initial and amended protests. With regard to the issue of ownership, the Navy argued that Mirabella had submitted evidence of "other sufficient control" to carry out all the terms and conditions of the leases to be awarded, and thus, had met this RFP requirement. On October 19, GVC amended its protest a second time based upon its review of the agency's report. In this protest, GVC argued that Mirabella had failed to offer a purchase option and that the awardee's proposal was unacceptable because in the fifth option year, its proposed rents also exceeded the statutory cap. On

¹While the issue of ownership is the one which GVC now considers meritorious, it also contended that the Navy had disregarded the evaluation criteria, unfairly evaluated GVC's proposal relative to Mirabella's proposal, and placed undue emphasis on price. Prior to filing its protest with our Office, on August 19, GVC had raised the same issues in an agency-level protest.

²The cap on "rent" includes the costs of utilities and maintenance, which the agency estimated at between \$4,000 and \$5,000 per year. For evaluation purposes, the Navy added annual utility and maintenance costs, escalated each year after the base year, to each offeror's proposed rents.

October 25, the Navy notified GVC that it had determined that there was a need to reopen negotiations with the offerors and to obtain new best and final offers (BAFO). On October 28, we dismissed the protests as academic.

Pursuant to our Regulations, if the contracting agency decides to take corrective action in response to a protest, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(e); KIME Enters., Inc.--Entitlement to Costs, B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523. Our rationale for making such a declaration is our concern that some agencies take longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Id. Our decision whether to award costs is based on the circumstances of each case. While we will not award protest costs in every case in which an agency takes corrective action, we will award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Id. In this regard, where the issue on which corrective action is based involves a close question, it is not considered a "clearly meritorious" bid protest. See ManTech Field Eng'g Corp.--Recon., B-246152.5, Dec. 17, 1992, 92-2 CPD ¶ 422.

The Navy advises our Office that after receipt of GVC's October 19 amended protest, it conducted another proposal technical review. During this review, it noted that Mirabella had submitted preliminary drawings that failed to comply with all of the RFP requirements. The agency determined that additional discussions were necessary to correct these deficiencies. The agency also learned that Congress was considering raising the statutory cap on rental housing in Italy.³

Under the circumstances of this case, the protester is not entitled to recover its protest costs. First, according to the agency, the corrective action was based upon its discovery of drawing deficiencies in Mirabella's proposal, matters which were not identified as issues in any of GVC's protests. Second, to the extent one could infer that the

³In fact, the Department of Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2801, 107 Stat. 1547 (1993), amended 10 U.S.C. § 2828 to provide for the Secretary of the Navy to lease not more than 2,000 units of family housing in Italy for a maximum lease amount of \$25,000.

corrective action in fact was based on GVC's primary protest grounds, we find that those grounds were either not clearly meritorious or that there was no undue delay in taking corrective action.


With regard to the issues of ownership and purchase option, the Navy explains that Mirabella submitted sufficient evidence of site control to meet the RFP requirement and that the awardee's offer of a "right to first refusal" purchase option met the applicable RFP requirement. While GVC argues that it has established that Mirabella's land interest is insufficient under Italian law to meet the requirement, from our review of the record, it is not clear that Mirabella failed to meet either of these RFP requirements. Thus, we cannot conclude that GVC's protests on these grounds were clearly meritorious.

With regard to the issue of Mirabella's proposed rent, it appears that in the fifth option year, the awardee's rent would exceed the statutory cap in effect at the time of award. Although the agency maintains that the operation of the contract would prevent Mirabella from charging rent in excess of the cap, the record reflects an agency determination during negotiations that it could not contract to pay any rent which would later exceed the maximum rent allowed under the current statutory limit. Whether this issue is clearly meritorious does not concern us here, because we find that the Navy did not unduly delay in taking corrective action. GVC raised this issue for the first time in its October 19 protest and the Navy took corrective action 4 working days later. Such corrective action is the kind of prompt reaction to a protest that our Regulations are designed to encourage. Special Sys. Servs., Inc.--Entitlement to Costs, B-252210.2, June 8, 1993, 93-1 CPD ¶ 445.

Our conclusion is not changed by GVC's argument that the Navy should have been aware of Mirabella's excessive proposal. According to GVC, since the Navy identified GVC's excessive rent proposal and requested dismissal of the protest on that basis on September 10, the agency should have identified the same problem in the awardee's proposal, and should have known to take corrective action at that time. We disagree. While an agency should be aware of any errors in its evaluations and take corrective action when necessary, when it is not so aware, the bid protest process is an effective tool for identifying and seeking correction of unrecognized evaluation errors. The mere existence of an error of which an agency should arguably be aware and take action to correct, does not mean that the agency has unduly delayed by not taking corrective action until after the

alleged error is identified in a bid protest.¹ Where, as here, an agency takes expeditious corrective action after the filing of an amended protest, a protester is not entitled to costs. Henkels & McCoy, Inc., B-250875 et al., Feb. 24, 1993, 93-1 CPD ¶ 174. The promptness of the agency's corrective action is not measured from the protester's initial protest where the initial protest did not identify in any way the issue on which corrective action is based. Id.; Network Software Assocs., Inc.--Request for Declaration of Entitlement to Costs, 72 Comp. Gen. 78 (1993), 93-1 CPD ¶ 46.

Accordingly, GVC's request for a declaration of entitlement to costs is denied.


for Robert P. Murphy
Acting General Counsel

¹In this regard, problems with GVC's proposal were more obvious than those alleged in Mirabella's proposal. In all of GVC's proposals, its proposed rent, when combined with the utility and maintenance costs, exceeded the statutory cap in the base year and every option year, even without application of the annual escalation factor. Mirabella's proposed rent did not exceed the statutory cap until the fifth option year and then only because of the annual escalation of utility and maintenance costs. Further, under the new statutory cap, Mirabella's proposal would be fully acceptable in all contract years while GVC's proposals would exceed the cap in most years.